Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

HUGHES ELECTRONICS CORPORATION, INC.
and DIRECTV, INC.,

Petitioners,

v.

ROBERT GARCIA, d/b/a DIRECT SATELLITE TV;
D3 TECHNOLOGIES, INC.; CLEAR CHOICES II, LTD.;
SWARTZEL ELECTRIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court can override the terms of the parties' arbitration agreement by imposing classwide arbitration as a matter of public policy, when the parties have agreed that any arbitration shall be governed by the procedural rules of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, which has consistently been interpreted to preclude classwide arbitration absent the express consent of the parties?

STATEMENT PURSUANT TO RULE 29.6

This brief is filed on behalf of Petitioners DIRECTV, Inc. and Hughes Electronics Corporation (referred to collectively as "DIRECTV"). DIRECTV, Inc. is a wholly-owned subsidiary of DIRECTV Holdings, LLC, which is a wholly-owned subsidiary of Hughes Electronics Corporation. General Motors Corporation is the parent company of Hughes Electronics Corporation. General Motors Corporation is the only publicly held company that owns 10% or more of Petitioners Hughes Electronics Corporation and DIRECTV, Inc.

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Appendix C — Order Of The Supreme Court Of California Denying Petition For Review Filed February 25, 2003 ..... 27a

Petitioners DIRECTV, Inc. and Hughes Electronics Corporation (collectively, "DIRECTV") respectfully pray that a writ of certiorari issue to review the decision handed down by the California Court of Appeal, Second Appellate District, Division One. The California Supreme Court denied review on February 25, 2003.

OPINIONS AND ORDERS BELOW

The December 11, 2002 opinion of the Court of Appeal, affirming the trial court ruling, is an unreported decision, a true and correct copy of which is included herein as Appendix A. The April 17, 2002 trial court ruling is an unreported decision, a true and correct copy of which is included herein as Appendix B. The February 25, 2003 denial of review by the California Supreme Court is an unreported decision, a true and correct copy of which is included as Appendix C.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeal was entered on December 11, 2002, and became final on January 10, 2003. *See* App. A. DIRECTV timely filed a petition for review before the California Supreme Court on January 17, 2003, which was denied on February 25, 2003. *See* App. C. Pursuant to Supreme Court Rule 13, this petition became due on May 26, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) to review, by writ of certiorari, the Court of Appeal's December 11, 2002 opinion affirming the trial court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause ii, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 9, Section 2 of the United States Code provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This action arises from a dispute between Respondents Robert Garcia ("Garcia"), D3 Technologies, Inc. ("D3 Technologies"), Clear Choices II, Ltd. ("Clear Choices II"), and Swartzel Electric ("Swartzel") (collectively, "Plaintiffs" or "Respondents") and Petitioners DIRECTV, Inc. ("DIRECTV") and its corporate parent, Hughes Electronics Corporation ("Hughes") (collectively, "Defendants" or "Petitioners"). Respondents claim to represent members of a putative class of independent commercial retailers ("retailers"), all of whom have alleged that DIRECTV has failed to compensate them adequately under the terms of their individual Sales Agency Agreements ("Agreement").

DIRECTV is a California corporation and is in the business of providing digital home satellite television services. *See* First Amended Complaint ("First Am. Compl.") ¶ 6. It has been in business since 1994, and through a network of retailers, sells its services throughout the entire country.

Respondents are independent retailers who sell or in the past have sold satellite systems and in connection therewith, have promoted DIRECTV's programming services and solicited customers to activate service with DIRECTV. *See id.*, ¶ 13; *cf.* Declaration of John Sbarounis, dated March 8, 2002 ("Sbarounis Decl."), ¶ 2; Declaration of Jonathan Schiff, dated March 8, 2002 ("Schiff Decl."), ¶ 1. Garcia is an individual and a resident of Texas; D3 Technologies is a Texas corporation operating in Texas; Clear Choices II is a resident of Wisconsin and operates in Wisconsin; and Swartzel is a California partnership. *See* First Am. Compl., ¶¶ 1-4.

On April 20, 2001, Respondent Robert Garcia filed a Demand for Arbitration with the American Arbitration Association, identifying claims for fraud, breach of contract, and tortious interference with contractual relations, and seeking to certify a class of retailers against DIRECTV. *See* Demand for Arbitration, dated April 20, 2001. This Demand was amended to name 14 other claimants in the arbitration proceeding, including named plaintiff in this action, Clear Choices II. *See* App. B at 1, 6. The parties had each selected their respective "party appointed" arbitrator and were in the process of jointly selecting the third "neutral" arbitrator.

Despite the pending arbitration proceeding, Garcia thereafter filed a Complaint in the Superior Court for the County of Los Angeles on October 4, 2001 alleging that Petitioners breached the Agreement existing between themselves and thousands of independent DIRECTV retailers by failing to compensate fully retailers according to the terms of their individual contracts. *See generally* Complaint ("Compl."). Specifically, Respondents allege that DIRECTV failed to pay retailers properly for the commissions that they earned, failed to pay retailers continuing service fees for subscribers who maintained their subscriptions, applied wrongful "chargebacks" which offset the amount of money owed to retailers, and wrongfully withheld other forms of compensation. *See* First Am. Compl., ¶¶ 13-20. DIRECTV vigorously disputes each accusation, and to date, no evidence has been placed in the record supporting any of the allegations. Respondents claim damages in excess of $300,000,000. *See* Compl.

Respondents seek to certify a class of independent retailers, each of whom has its own agreement with DIRECTV for the payment of commissions based upon the individual subscribers solicited by each individual retailer. This putative class hopes to proceed against DIRECTV and Hughes in an effort to recover the allegedly lost commissions and continuing service fees, as well as to recover amounts allegedly lost to improperly calculated chargebacks. *Id.*, ¶¶ 21-28.

Petitioners immediately demurred to the Complaint on a number of grounds, including the doctrine of prior action pending pursuant to *Cal. Civ. Proc. Code* § 430.10(c), which was based on the Demand for Arbitration that had been filed in April, and sought to compel the entire dispute to arbitration pursuant to the parties' agreements. *See* DIRECTV's and Hughes' Demurrer, or in the Alternative, Motion to Compel Arbitration, dated November 9, 2001. Garcia never opposed this demurrer. Instead, after joining his claims with three other plaintiffs — D3 Technologies, Clear Choices II, and Swartzel Electric — they filed a First Amended Complaint on February 8, 2002.

On February 15, 2002, petitioners demurred to the First Amended Complaint seeking a dismissal of all claims on identical grounds and seeking to compel those claims to arbitration on an individual basis. *See* DIRECTV's and Hughes' Demurrer, or in the Alternative, Motion to Compel Arbitration, dated February 15, 2002. The parties' arbitration agreement provides that "[t]his section and any arbitration conducted hereunder shall be governed by the United States Arbitration Act. (9 U.S.C. § 16, *et seq.*)." Agreement ¶ 18.12(c). Petitioners also argued that the Court was without authority to compel these disputes to arbitration as a classwide proceeding because the Federal Arbitration Act, which governed the conduct of

arbitration, precluded a classwide arbitration absent the express consent of the parties. Because the parties had not agreed to arbitration in a classwide proceeding, the FAA preempted California's state law to the contrary.

On April 17, 2002, the trial court ruled on petitioners' Demurrer and Motion to Compel Arbitration. In that April 17, 2002 Ruling, the trial court sustained the demurrer as to respondents Garcia and Clear Choices II — the two plaintiffs who were named in the arbitration proceeding as well — on the ground of a prior action pending, and stayed the order compelling the remaining claims to arbitration until after the court entertained class certification proceedings to determine whether a class action was appropriate. *See* App. B at 1-2.

On May 2, 2002, Petitioners DIRECTV and Hughes filed a Notice of Appeal pursuant to the FAA (9 U.S.C. § 16, *et seq.*) and *Cal. Civ. Proc. Code* § 1294(a), contending that the California authorities on which the trial court relied — which permit classwide arbitration in the absence of the parties' explicit agreement — are preempted by the FAA, which has been consistently interpreted by federal courts to preclude classwide arbitration absent the parties' express agreement. *See* Notice of Appeal.

On December 11, 2002, the Court of Appeal issued an opinion affirming the trial court's decision, concluding that the FAA did not preempt California's public policy permitting classwide arbitration. On January 17, 2003, DIRECTV and Hughes filed a petition for review with the California Supreme Court which was denied on February 25, 2003. This petition for a writ of certiorari followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FAA requires both federal and state courts to enforce arbitration agreements according to their terms. Where parties have agreed that their arbitration will be "governed by" the FAA, which does not authorize class actions absent express agreement by the parties, courts are not free to override that agreement by invoking a state public policy favoring class actions. The courts of California (and South Carolina in *Bazzle v. Green Tree Fin. Corp.*) have assumed a course of re-writing the parties' arbitration agreements to permit classwide arbitration in contravention of the parties' contractual expectations and the mandates of the FAA in an effort to promote state public policy. The FAA prohibits such a result.

The imposition of a state public policy favoring classwide arbitrations, absent express consent of the parties, violates the guiding principle of the FAA — that arbitration agreements should be interpreted and enforced just like other contracts — and raises serious due process concerns.

Pursuant to the FAA, courts are required to enforce arbitration agreements consistent with the contracting parties' intent, not in accordance with their own notions of fairness or public policy. It is manifestly unreasonable for a court to assume that the parties would have agreed to arbitrate claims on a classwide basis simply because they agreed to arbitrate claims on an individual basis. Class actions are an exception to the general rule that parties represent themselves in a legal dispute, and that exception has been upheld in the courtroom context only in light of procedural rules that carefully limit the use of the class action mechanism, and the opportunity for judicial appellate review. Those procedural rules are inapplicable in the

arbitration context, and the opportunities for judicial review are virtually non-existent. Moreover, the stakes are much higher in a class action setting, and it is unlikely that parties would be willing to sacrifice the procedural safeguards and judicial review accompanying class action litigation for the efficiencies and informalities of arbitration. Requiring parties to arbitrate on a classwide basis when they never contemplated or agreed to do so also raises serious due process concerns, both for the actual parties to the dispute, and the absent class members as well.

The California Court of Appeal, in reaching the decision below, re-wrote the parties' arbitration agreement in contravention to the parties' express wishes, their reasonable expectations, their due process rights, and the Congressional mandate of the FAA. Accordingly, the petition for writ of certiorari should be allowed and the lower court decision reversed.

REASONS FOR GRANTING THE PETITION

Petitioners Hughes Electronics Corporation and DIRECTV, Inc. (collectively, "DIRECTV") seek review of the California Court of Appeal decision below and, pursuant to a Motion filed currently herewith, consolidation with *Green Tree Fin. Corp. v. Bazzle, et al.*, No. 02-634 (hereinafter referred to as "*Bazzle*"), currently pending before this Court. This Court recently granted review in *Bazzle*, which presented an issue virtually identical to that which Petitioners currently bring before this Court; namely, "Whether the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class action arbitration." Oral argument was heard on April 22, 2003 and no decision has been entered yet. Because of the similarity

of issues presented, and in order to avoid inconsistent results, DIRECTV respectfully petitions for a writ of certiorari to review the decision by the California Court of Appeal.

The facts and circumstances of this case are even more compelling than those presented in *Bazzle* and require review by this Court. Despite the Congressional mandate of the Federal Arbitration Act ("FAA"), which requires courts to enforce arbitration agreements strictly according to their terms, California courts have consistently flouted this mandate as demonstrated by the Court of Appeal's decision herein. In this case, the parties expressly agreed to arbitrate their disputes pursuant to the substantive and procedural rules of the Federal Arbitration Act, which do not permit classwide arbitrations absent the consent of the parties. Despite the express arbitration agreement between the parties, which did not provide for classwide arbitrations, the California Court of Appeal imposed its own public policy favoring class actions upon the parties, without regard to their wishes. The Court of Appeal held in its opinion that a court is permitted to follow state law and order classwide arbitration, despite the parties' incorporation of federal procedures to govern their arbitration.[1] In so doing, the California Court of Appeal has undermined the letter and spirit of the FAA, and the decision below should be reversed.

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1. Although the court has not yet certified a class or made a determination that a class would be appropriate in this case, Petitioners face the costly and time-consuming process of class discovery and certification proceedings, essentially depriving Petitioners of the very benefits provided by arbitration, such as efficiency and cost-effectiveness.

I. THE FAA DOES NOT ALLOW COURTS TO INVOKE A PUBLIC POLICY FAVORING CLASS ACTIONS TO OVERRIDE THE EXPRESS TERMS OF AN ARBITRATION AGREEMENT

As this Court has often noted, the FAA was enacted "to revers[e] centuries of judicial hostility to arbitration agreements . . . [by] plac[ing] arbitration agreements upon the same footing as other contracts." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225-226 (1987) (internal quotations and citations omitted).[2] Accordingly, the Act established a "federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), that requires courts to enforce private arbitration agreements "according to their terms." *Volt Info. Sci., Inc. v. Bd. of Trs. of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("[C]ourts are bound to interpret contracts in accordance with the expressed intentions of the parties . . ."). Parties are thus free to agree to arbitral procedures as formal or informal as they wish, and the FAA requires both federal and state courts to respect and enforce the parties' agreement. *See, e.g., Volt*, 489 U.S. at 469 ("[P]arties are generally free to structure their

2. *See also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985) ("[The] purpose [of the FAA] was to place an arbitration agreement upon the same footing as other contracts, where it belongs, and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.") (internal quotations and citations omitted); *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) ("'[T]he purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures.'") (quoting *Metro Indus. Painting Corp. v. Terminal Constr. Corp.*, 287 F.2d 382, 387 (2d Cir. 1961)).

arbitration agreements as they see fit. . . . [T]hey may limit by contract [the rules under which that arbitration will be conducted.]"); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.") (Posner, J.).

California, however, has flouted this federal policy. Recent California decisions indicate a judicial unwillingness to enforce arbitration agreements deemed to conflict with California's public policy favoring class actions. This trend began with the California Supreme Court's decision in *Keating v. Super. Ct.*, 31 Cal. 3d 584, 623 (1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984), which held that state law authorized classwide arbitration but did not address "the question whether superimposing class action procedures on a contract arbitration was contrary to the [FAA]." *Southland*, 465 U.S. at 8-9. The California Court of Appeal did address that issue in *Blue Cross v. Super. Ct.*, 67 Cal. App. 4th 42 (1998), and held that "when the arbitration agreement between the parties is *silent* as to classwide arbitration and state law specifically authorizes it . . . , an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the [FAA]." *Blue Cross*, 67 Cal. App. 4th at 60 (emphasis added).

Subsequent California decisions have relied on *Blue Cross* to impose a public policy favoring classwide arbitration *even where the express terms of the parties' arbitration agreement do not permit classwide treatment*. This is one such instance. The arbitration agreement between DIRECTV and the retailers specifies that "[t]his section and any arbitration conducted

hereunder shall be governed by the United States Arbitration Act," thereby evincing the parties' intent to conduct their arbitration under the FAA's, not California's, procedural rules. *See, e.g., Volt*, 489 U.S. at 480-81 (interpreting this "governed by" language to refer to the procedural rules that would apply to the arbitration). As a matter of federal law, however, the FAA does not permit classwide arbitration unless the parties have expressly agreed to such proceedings. *See, e.g., Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 510 (7th Cir. 1999); *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 276-77 (7th Cir. 1995).[3] Thus, the Garcia court overrode the parties' agreement by insisting that the retailers suing DIRECTV must be allowed to pursue a classwide arbitration. That decision is particularly incongruous in the context of the DIRECTV Agreement, which involves sophisticated commercial parties (DIRECTV and its retailers) on both sides, and thus does not implicate the concern with protecting allegedly aggrieved consumers that underlies California's policy favoring class actions in the first place. *See, e.g., Keating*, 31 Cal. 3d at 609. By disregarding the parties' express contractual wishes, California has placed itself squarely at odds with established precedent from this Court.

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3. Similarly, most federal courts have held as a matter of federal law that the FAA does not allow the consolidation of multiple arbitration proceedings absent an express agreement of the parties. *See, e.g., Gov't of the U.K. v. Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282-283 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhauser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

Indeed, allowing States to rewrite arbitration agreements in this manner would allow states to undermine arbitration itself. The whole point of arbitration is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). That trade-off is attractive not just to large corporate defendants, but to plaintiffs as well: "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind." *See* S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) ("the Act, by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, . . . corporate interests [and] . . . individuals.'") *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995). That trade-off breaks down, however, to the extent that arbitration proceedings start to mimic the complexity of courtroom proceedings. *See, e.g.*, *Keating*, 31 Cal. 3d at 623 (Richardson, J., concurring and dissenting) ("[C]lass procedures would tend to make arbitration inefficient instead of efficient, lengthy instead of expeditious, and procedural instead of informal."). Parties forced to undertake cumbersome procedures in arbitration risk getting the worst of both worlds: the complexity and delay of class-action litigation, without the accompanying procedural safeguards and meaningful appellate review.

II. THE IMPOSITION OF CLASSWIDE ARBITRATION WHEN THE PARTIES HAVE NOT EXPRESSLY AGREED TO IT VIOLATES THE FAA BECAUSE IT IS REFORMING THE PARTIES' AGREEMENT IN A MANNER THAT WOULD SEVERELY PREJUDICE THE CONTRACTING PARTIES AND RAISES CONSTITUTIONAL DUE PROCESS CONCERNS

Because a state policy mandating classwide arbitration absent an express agreement to that effect "would disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration" than they had bargained for, *Champ*, 55 F.3d at 275 (internal quotation and brackets omitted), the FAA has been consistently interpreted so as to preempt such a policy. As these courts have explained, to permit otherwise would effectively re-write the parties' arbitration agreement by imposing upon them a procedure to which they never agreed, and in many cases, never contemplated. *Champ*, 55 F.3d at 275-277.

As this Court has repeatedly recognized, arbitration is a matter of contractual freedom between the parties, and the overriding purpose of the FAA is to respect and enforce the parties' decision to arbitrate according to their own terms. *Volt*, 489 U.S. 468, 476 (1989) ("[T]he federal policy is simply to ensure the enforceability, *according to their terms*, of private agreements to arbitrate."). Indeed, absent an agreement to arbitrate, courts are without authority to order parties to resolve their dispute by way of binding arbitration, thus recognizing the fact that arbitration involves significant tradeoffs that must be carefully contemplated and expressly agreed to by the parties. *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 662 (7th Cir. 2002) ("[A]rbitration is a matter

of contract between the relevant parties; no party can be required to arbitrate absent an agreement to do so.").

Parties often choose arbitration because it is a relatively quick, informal and inexpensive means of resolving disputes. However, in exchange for these savings of time and money, the parties give up significant procedural safeguards that they would otherwise be entitled to in a judicial proceeding. A party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.*, 473 U.S. at 628.

Arbitration vests the decision maker with wide-reaching power to decide the underlying dispute without the formalities and protections afforded litigants in a judicial proceeding. There is no requirement that arbitrators be lawyers. Arbitrations need not preserve a transcript of their proceedings and arbitrators are not required to justify their awards with written opinions. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203-204 and n.4 (1956). Arbitrators are not bound by the rules of civil procedure, discovery or evidence that would otherwise apply in a judicial proceeding, thereby vesting the arbitrator with tremendous discretion. *See Pike v. Freeman*, 266 F.3d 78, 92 n.17 (2d Cir. 2001) ("Federal Rules of Civil Procedure do not apply in arbitrations before the American Arbitration Association. . . ."); *Champ*, 55 F.3d at 276; *Cal. Civ. Proc. Code* § 1282.2(d) ("[R]ules of judicial procedure need not be observed" in an arbitration); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096, 1108 (1995) ("We read White [v. Preferred Research, Inc. (S.C. App. 1993)] as recognizing the general proposition that rules of civil procedure typically do not apply in arbitration proceedings — a conclusion with which we agree.").

Most significantly, judicial review of arbitral awards is carefully circumscribed and extremely limited in order to preserve the efficiency and finality of arbitrations. While the precise rules vary with the jurisdiction, in general, arbitration awards are difficult to overturn even where there is clear error. In California, even an unjust award is not subject to review: "[A]n arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 6 (1992); *see also Cal. Civ. Proc. Code* § 1286.2.

Moncharsh based its holding on the fact that arbitration awards must be final, or "the availability of judicial review of [arbitration awards] would tend to deprive the parties to the arbitration agreement of the very advantages that the process is intended to convey." *Moncharsh*, 3 Cal. 4th at 10 (quotations omitted). "Ensuring arbitral finality thus requires that judicial intervention in the arbitration process be minimized." *Id.*

In federal courts, the FAA supplies the standards for judicial review. An award may be vacated or modified only where the award is procured by corruption, fraud or undue means; there was evident partiality or corruption in the arbitrators; the arbitrators improperly refused to hear material evidence or postpone the hearing; the arbitrators exceeded their powers; or there was an evident miscalculation or mistake. 9 U.S.C. §§ 10-11. The Ninth Circuit has described the standard of review as "extremely narrow . . . If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced."[4] A federal court "may vacate or modify an

4. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1271 (9th Cir. 2002).

arbitration award only if that award is 'completely irrational,' exhibits a 'manifest disregard of law,' or otherwise falls within one of the grounds set forth in 9 U.S.C. §§ 10 or 11." *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997).

Thus, the decision to arbitrate is not one to be undertaken lightly because a party is giving up the procedural safeguards and rights that form the very cornerstone of the American judicial system. Individuals and corporations alike may be willing to bear the risk of arbitrator error in an individual case, based on an *ex ante* determination that this risk is outweighed by the savings of time and money associated with arbitration or the assumption that over time errors favoring one side or the other will neutralize each other in the aggregate. But the impact of an error in a class arbitration is multiplied by the number of class members, and therefore may be an unacceptable risk to a contractual party considering dispute resolution economics versus reduced due process. This is a decision that the parties must make for themselves, and once made, the FAA requires that courts respect and enforce that decision.

Moreover, the judicial imposition of classwide arbitration when the parties never contemplated or agreed to such a proceeding creates serious due process concerns. Although nothing in the FAA would prohibit contracting parties from agreeing to classwide arbitration, and if so agreed, courts would be required to enforce such an agreement just like any other contract, courts cannot impose such a proceeding on the parties against their will.

The stakes are much higher in a class action setting and thus the parties should not be assumed to be willing to give

up the procedural safeguards provided by the judicial system in exchange for the informal and inexpensive procedures provided by arbitration. Indeed, the *Bazzle* case currently pending before this Court highlights this fact. In that case, a class of 3000 members was certified and the arbitrator awarded approximately $27 million in damages and attorneys' fees without any evidence of actual harm to the putative class. *See Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 361-62 (S.C. 2002) (upholding award where no showing of "manifest disregard for the law" and noting that while the standard for appellate review of a court's class certification decision is abuse of discretion, the review of an arbitral award is "far more limited."); *see also Discover Bank v. Super. Ct.*, 129 Cal. Rptr. 2d 393, 410 (Ct. App. 2003) (review granted on April 9, 2003) ("[A] multi-million dollar class arbitration award entered on nothing more than mere whim cannot be corrected under California law.").

Because arbitration is a matter of contract, the enforcement of arbitration provisions must be based upon the intention of the parties at the time the agreement is made. If the parties never expressly agreed to classwide arbitration of claims, it is unlikely that the parties ever contemplated or would have agreed to give up their procedural rights to the rules of evidence, civil procedure, and most importantly, judicial review of a classwide award that could involve thousands of parties and perhaps, hundreds of millions of dollars. Given the relative novelty of classwide arbitration, and the fact that nearly all federal courts to date have held that it cannot be ordered absent an express agreement between the parties, there is no basis for a court to assume the parties intended such a drastic result, without any indication that classwide arbitration was within the parties' reasonable expectations when they executed the arbitration agreement.

The judicial imposition of classwide arbitration presents due process concerns to the absent class members as well. A class action "is a recognized exception" to the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). Because class action judgments bind absent class members, courts must be vigilant to ensure constitutional due process. *See id.* at 41-42 (due process requires that litigants are adequately represented by parties present).

Although it is true that parties may agree to waive these due process protections by agreeing to submit their disputes to arbitration, courts cannot imply a waiver of such protections without a clear expression of intent by the parties. This waiver might be found if every putative class member expressly agreed to classwide arbitration in their arbitration agreement. In this situation, all parties to the arbitration agreement would have made a conscious and informed decision that they were giving up certain procedural safeguards in exchange for the benefits of arbitration. Without such an agreement, however, absent class members may find that they too have lost significant rights as a result of an adverse ruling in a classwide arbitration to which they never agreed to participate and for which they have no adequate recourse.

While arbitrations naturally provide salutatory benefits of relative speed, reduced cost and finality, these benefits do not come without a price, and parties are forced to give up significant rights to procedural safeguards otherwise guaranteed by our system of justice. These negative tradeoffs

are magnified by applying a classwide arbitration award to thousands of absent class members who may be bound to an erroneous judgment without their consent. Similarly, the impact of an error in a classwide arbitration is multiplied by the number of class members and the result can be financially devastating to the defendant, as the *Bazzle* case demonstrates. Because of the serious, and essentially permanent, consequences that can accompany classwide arbitrations, it is essential that the parties expressly agree to proceed in this manner in order to protect the reasonable expectations of the parties at the time they contract. To permit otherwise would result in a drastic reformation of the parties arbitration agreements in violation of the FAA. Nearly all of the federal courts to decide this issue have agreed. They have gotten it right.

III. CALIFORNIA COURTS HAVE CONSISTENTLY EXALTED THEIR OWN NOTIONS OF PUBLIC POLICY OVER THE CONGRESSIONAL MANDATE EMBODIED IN THE FAA

All of these concerns notwithstanding, California has exalted its own notion of public policy over the mandates of the FAA and the agreements of the parties. A series of decisions from the California courts highlights the degree to which they have consistently disregarded the FAA and the express terms of parties' arbitration agreements in order to implement its public policy. Indeed, California courts have refused to enforce arbitration agreements that *specifically preclude* classwide arbitration. In *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101-1102 (2002), the court of appeal held that an express class-action waiver provision in an arbitration agreement was unenforceable because it violated California's public policy favoring class actions. According

to *Szetela*, such a provision "contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general." *Id.* at 1101. Under *Szetela*, parties to a contract in California cannot bargain to preclude classwide arbitration, despite the bargaining freedom protected by the FAA. *Id.*; *see also Mandel v. Household Bank (Nevada)*, 105 Cal. App. 4th 75 (2003) (review granted on April 9, 2003); *but cf. Discover Bank*, 129 Cal. Rptr. 2d at 403. Even the Ninth Circuit has recently adopted this position. *See Ingle v. Circuit City Stores, Inc.*, No. 99-56570 (9th Cir. May 13, 2003) (finding that an arbitration provision which expressly prohibited class arbitration was substantively unconscionable under California law); *see also Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (same).[5]

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5. California courts have not limited their imposition of public policy on arbitration agreements to the class action context. Recently, the California Supreme Court held that state courts can declare certain types of claims inarbitrable under the FAA, despite this Court's repeated pronouncements that only Congress has the authority to do so. *See Cruz v. Pacificare Health Sys.*, 30 Cal. 4th 303 (2003) (holding that claims for injunctive relief brought under the unfair competition statute are inconsistent with arbitration, and are therefore inarbitrable under the FAA, despite explicit contractual agreements to the contrary). As Justice Chin recognized in his dissent, the majority opinion in *Cruz* runs afoul of numerous decisions by this Court, including *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), and *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The rationale of the California Supreme Court in *Cruz*, holding that courts can render certain types of claims inarbitrable under the FAA if arbitration is inconsistent with the state legislative intent is even more attenuated

(Cont'd)

The analysis of these courts is based on the faulty premise that state courts are free to rewrite arbitration agreements at will as long as they invoke a doctrine of general applicability, like unconscionability, to invalidate a limitation on class actions. *See, e.g., Blue Cross*, 67 Cal. App. 4th at 50-51; *Szetela*, 97 Cal. App. 4th at 1099-1101; *Ting*, 319 F.3d at 1148-1150 and n.15. But the use of the unconscionability doctrine to judicially amend arbitration agreements so as to allow class actions reflects a state policy mandating a particular type of arbitration procedure *notwithstanding* the contracting parties' wishes.

The FAA does not allow States to regulate arbitration in this manner, regardless of whether they purport to impose such regulation through the rubric of a general doctrine like unconscionability. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996) (FAA preempts state law requiring notice of arbitration clause in underlined capital letters on first page of contract); *Mastrobuono*, 514 U.S. at 58 ("[I]f contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms *even if a rule of state law would otherwise exclude such claims from arbitration*.") (emphasis modified). What matters

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(Cont'd)

than the California Supreme Court's decision in *Keating* which was reversed by this Court. *See Keating v. Super. Ct.*, 31 Cal. 3d 584 (1982). In *Keating*, the California legislature had provided that claims brought pursuant to the California Franchise Investment Law were subject to judicial review. *See id.* at 604. Consequently, the California Supreme Court held that such claims were not arbitrable despite the parties' arbitration agreements. This Court reversed, holding that the section of the Franchise Investment Law which precluded arbitration violated the Supremacy Clause. *See Southland*, 465 U.S. at 16 (1984).

is not the legal label placed on the state policy, but whether that law or policy is specific to arbitration. Were the law otherwise, States would be free to thwart arbitration at will by simply invalidating any disfavored arbitration provision as unconscionable. States may not fiat class arbitration when the parties have declined to implement the procedure. Accordingly, DIRECTV respectfully requests that this Court grant this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION ONE FILED DECEMBER 11, 2002

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

B158570

(Super. Ct. No. BC259174)

ROBERT GARCIA et al.,

Plaintiffs and Respondents,

v.

DIRECTV, INC., et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County, Victoria G. Chaney, Judge. Affirmed.

The issue in this case is whether the rule announced in *Blue Cross of California v. Superior Court* (1998) 67 Cal. App.4th 42 — that, in the absence of a class action waiver, the Federal Arbitration Act does not preclude a classwide arbitration — applies in this case. We hold that it does, and therefore affirm the order before us on this appeal.

Appendix A

BACKGROUND

Through a network of independent dealers, DirecTV, Inc., provides digital home satellite television services. In April 2001, Robert Garcia, a DirecTV dealer doing business as Direct Satellite T.V., filed a "Class Action Demand for Arbitration" with the American Arbitration Association, identifying claims against DirecTV for fraud, breach of contract, and tortious interference with contractual relations.[1] In June, Garcia (joined by 14 other dealers, including Clear Choices II, Ltd.) filed an amended demand. In October, Garcia filed this lawsuit against DirecTV and its parent, Hughes Electronics Corporation. DirecTV demurred to Garcia's complaint and, in the alternative, moved to compel arbitration.

In February 2002, before a hearing was held on DirecTV's demurrer and motion, Garcia (joined by Clear Choices II and two other dealers, D3 Technologies, Inc., and Swartzel Electric) filed a first amended complaint, this time as a class action alleging a variety of claims based on allegations that DirecTV has failed to pay earned commissions and other compensation due to the dealers. Garcia and the other plaintiffs hope to certify a national class of dealers who have acquired subscribers for DirecTV's services within the last four years.

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1. DirecTV and its dealers are bound by DirecTV's standard Sales Agency Agreement, which obligates DirecTV to pay commissions to its dealers for each customer obtained by the dealer. All of the claims made in these proceedings arise out of those Agreements, and all of those Agreements include arbitration provisions that do not prohibit classwide arbitrations. Garcia's proposed class would include all of DirecTV's dealers.

Appendix A

At DirecTV's request, the trial court treated DirecTV's demurrer and motion to compel arbitration as its response to the first amended complaint. Opposition was filed and a hearing was held, after which (on April 17, 2002) the trial court: (1) sustained the demurrer without leave to amend as to Garcia and Clear Choices II, on the ground that another action (the arbitration) was pending; (2) as to the remaining plaintiffs, sustained the demurrer with leave to amend as to some of the causes of action and overruled it as to others; and (3) granted DirecTV's motion to compel arbitration. The court rejected DirecTV's contention that classwide arbitration is prohibited by the terms of the dealers' agreements with DirecTV, which provide for the resolution of all disputes by arbitration governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.), and found that the court has authority to order classwide arbitration in an appropriate case. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 613; *Blue Cross of California v. Superior Court*, *supra*, 67 Cal.App.4th 42.)

The court found that it, not the arbitrator, would have to determine the class action issues, and that the merits of the underlying dispute would then be decided by the arbitrator. For this reason, the court granted the motion to compel arbitration, "but only after determination of the class action certification issues" by the court. Procedurally, the court granted the motion to compel arbitration but stayed enforcement of that order "pending the court's ruling on a class certification motion." Recognizing "the need to expedite this matter to arbitration," the court (in its April 17 order) set a status conference for May. On May 2, DirecTV filed a notice

of appeal from the April 17 order. On May 22, the trial court stayed all further proceedings in the trial court pending resolution of this appeal.

DISCUSSION

DirecTV contends the parties agreed to be bound by the FAA, not California law, and that a class arbitration is not permitted by the FAA. According to DirecTV, *Blue Cross of California v. Superior Court*, *supra*, 67 Cal.App.4th 42, is either factually distinguishable or wrong. According to Garcia and the other plaintiffs (who are included in our subsequent references to Garcia), the April 17 order is not appealable, but is in any event correct. We agree with DirecTV that the order is appealable, but reject its efforts to distinguish *Blue Cross*.

I.

DirecTV views the April 17 order as "tantamount to a denial of the petition to compel arbitration" and, therefore, immediately appealable as an order denying a motion to compel arbitration. (Code Civ. Proc., § 1294, subd. (a) [an appeal may be taken from an order denying a petition to compel arbitration]; *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94; *The Energy Group, Inc. v. Liddington* (1987) 192 Cal.App.3d 1520.) In his respondent's brief, Garcia distinguished the cited cases because they involved appeals from orders staying arbitrations pending the completion of underlying lawsuits. But by the time of oral argument, Garcia — having briefed the merits of the

preemption issue and suffered the delay attributable to the appeal — joined with DirecTV in asking us to address the merits of the issue referred to by the parties as the "*Blue Cross*" issue.

Although the parties cannot confer appellate jurisdiction where none exists, we are of the view that we do have jurisdiction. (*Sanders v. Kinko's, Inc.* (2002) 99 Cal.App.4th 1106, 1109-1110.) The trial court found there was a "need to expedite this matter to arbitration," and it stayed the class certification proceedings only after DirecTV filed its notice of appeal, presumably in the interests of judicial efficiency. Under these circumstances, we agree with the parties that the April 17 order is tantamount to an order denying the motion to compel arbitration. (*Conaway v. Conaway* (1963) 218 Cal.App.2d 427, 428.)[2] Absent appellate jurisdiction, we would (as the parties agreed we could) treat the appeal as a petition for a writ of mandate — because the record is fully developed on the preemption issue, and because the issue has been fully briefed. (*Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 698; *Board of Dental Examiners v. Superior Court* (1998) 66 Cal.App.4th 1424, 1430.)

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2. Effective January 1, 2003, a trial judge will be able to "indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." (Assembly Bill 2865, approved by the Governor Sept. 19, 2002, adding section 166.1 to the Code of Civil Procedure.)

Appendix A

II.

DirecTV contends we are not bound by *Blue Cross* because DirecTV's agreements differ from the one before the court in *Blue Cross* — in our case, the dealers agreed that "any arbitration . . . shall be governed by" the FAA, not merely (as the plaintiffs in *Blue Cross*) that any arbitration was to be conducted in California "by the American Arbitration Association according to its commercial rules of arbitration." (*Blue Cross of California v. Superior Court*, *supra*, 67 Cal.App.4th at p. 47.) We disagree.

A.

Although the contractual language used in the *Blue Cross* agreements does differ from the language used by DirecTV, the parties in *Blue Cross* agreed that the arbitration was governed by the FAA. (*Blue Cross of California v. Superior Court*, *supra*, 67 Cal.App.4th at p. 48; see also *Sanders v. Kinko's, Inc.*, *supra*, 99 Cal.App.4th at p. 1109 [where the agreement provided that arbitration "may be" compelled and enforced according to the FAA and the parties agreed that the arbitration was governed by the FAA].) Since both cases were governed by the FAA, they are not distinguishable on that ground.

B.

Blue Cross holds that the FAA preempts a state's substantive law "to the extent it stands as an obstacle to contractual arbitration." (*Blue Cross of California v. Superior Court*, *supra*, 67 Cal.App.4th at p. 50; *Southland Corp. v.*

Keating (1984) 465 U.S. 1, 10 [the FAA declares "a national policy favoring arbitration" and withdraws "the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"].) As Division Five of our court put it in *Blue Cross*, the FAA "preempts state antiarbitration law so as to prevent state and federal courts from reaching different results about the validity and enforceability of arbitration agreements in similar cases." (*Blue Cross of California v. Superior Court*, *supra*, 67 Cal.App.4th at p. 52.) But the preemptive effect of the FAA is not complete, and there is no bar to the application of a state rule authorizing classwide arbitration where, as here, the arbitration agreement does not include a class action waiver.

Under California law, classwide arbitration is permissible, and our courts have authority to order classwide arbitration. (*Keating v. Superior Court*, *supra*, 31 Cal.3d at pp. 608-614.) As several courts have held, this rule is entirely consistent with the letter and the spirit of the FAA. (*Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.* (1983) 140 Cal.App.3d 251, 262; *Dickler v. Shearson Lehman Hutton* (Pa.1991) 596 A.2d 860, 867; *New England Energy Inc. v. Keystone Shipping Co.* (1st Cir.1988) 855 F.2d 1, 6-7 [a state law "whose purpose is to promote the expeditious resolution of cases by means of the arbitral process" is consistent with the FAA]; but see *Champ v. Siegel Trading Co., Inc.* (7th Cir.1995) 55 F.3d 269, 271 [holding that a federal district court has no authority under the FAA to certify classwide arbitrations].)

Based on these and other authorities, *Blue Cross* held that "when the arbitration agreement between the parties is silent as to classwide arbitration and state law specifically authorizes it in appropriate cases, an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the [FAA]." (*Blue Cross of California v. Superior Court*, *supra*, 67 Cal.App.4th at p. 60; see also *Sanders v. Kinko's, Inc.*, *supra*, 99 Cal.App. 4th at pp. 1113-1114 [applying the rule announced in *Blue Cross*].)

C.

We find *Blue Cross* substantively indistinguishable from the case before us and its reasoning persuasive, and we flatly reject DirecTV's contention that "federal procedural rules must govern this matter." (*Southland Corp. v. Keating*, *supra*, 465 U.S. at p. 16, fn. 10 [the Federal Rules of Civil Procedure "do not apply in . . . state-court proceedings"]; *Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 476-477; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409-410 [the procedural provisions of the FAA are not binding on state courts unless the state procedure at issue would defeat a right granted by Congress].)

It follows that the trial court has authority to determine the class certification issues.

Appendix A

DISPOSITION

The April 17, 2002, order is affirmed. Garcia is awarded his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

I concur:

SPENCER, P.J.

Appendix A

ORTEGA, J., Dissenting.

Only in the rarified atmosphere of an appellate court could an order compelling arbitration be taken as an order denying arbitration. This fits right in with other cases where we have, for example, said that "winner" means "loser." Plain English is no longer the language of our business. Instead, "legalese" rules the day. The cases cited by the majority for the proposition that arbitration stayed is arbitration denied have nothing to do with our case. In those cases, for example, a stay of arbitration so the underlying dispute can be tried in a court of general jurisdiction truly amounts to a denial of arbitration. In our case, the trial court issued an order clearly providing that the matter is to be arbitrated, either in an individual or class arbitration, depending on the outcome of further proceedings. There is no way to rationally conclude that the trial court's order amounts to a denial of arbitration. The trial court's order is interlocutory. We have no appellate jurisdiction. This appeal should be dismissed.

There is an inherent contradiction in the majority opinion. On the one hand, it says arbitration stayed is arbitration denied. Thus, goes the reasoning, we have appellate jurisdiction. But the majority go on to affirm the trial court's order compelling and staying arbitration. How can this be? If the trial court's order was indeed a denial of arbitration, should not the majority order the trial court to set aside its offending order and issue an order truly compelling arbitration? My colleagues are having it both ways. They view the trial court's order one way in order to anoint themselves with jurisdiction, then view the order another way in order to affirm the trial court.

Appendix A

My colleagues say it doesn't matter because they would treat the matter as a writ. If so, they should do just that and state their reasons. A writ petition is a request for *extra-ordinary* relief. There should exist some justification to treat a non-appealable order in such a fashion. I see nothing extraordinary about this matter. Just because an issue is fully briefed does not mean we should break the rules and treat it as something it is not. There is no wrong that needs correction here, nor is there any other compelling reason for us to step in before the trial court has completed its determination. Had this matter come to us as a true writ petition, it would surely have been summarily denied since the majority believe the trial court has done nothing that needs correcting. Indeed, the majority's affirmance of the trial court's order has the same effect as a denial of writ relief. Why engage in the fiction of treating a matter as a writ only to deny writ relief?

This "writ" amounts to nothing more than the majority giving the trial court an advisory opinion as to how it should rule on the class certification issue. In effect, we are conducting a motion *in limine.*

ORTEGA, J.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES DATED AND FILED APRIL 17, 2002

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Case No: BC 259 174

ROBERT GARCIA et al.,

Plaintiffs,

Vs.

DIRECTV, INC., et al.,

Defendants.

RULING ON DEFENDANTS DIRECTV'S AND HUGHES' DEMURRER TO THE FIRST AMENDED COMPLAINT, OR IN THE ALTERNATIVE, MOTION TO COMPEL ARBITRATION

Hearing date: 4/9/02

Ruling date: 4/17/02

After considering the moving, opposing and reply papers and the arguments of counsel at the hearing, the court now rules as follows:

Defendants DIRECTV's and Hughes' Demurrer to the First Amended Complaint is SUSTAINED without

leave to amend on the grounds that there is another action pending as to plaintiffs Robert Garcia and Clear Choices II, Ltd. only. (Code Civ. Proc., § 430.10(c).) As to these two plaintiffs, the action is abated pending disposition of the arbitration *Robert Garcia, d/b/a Direct Satellite TV, et al. v. DIRECTV, Inc., No.* 72-181-00521-01, now before the American Arbitration Association.

The demurrer to the Third Cause of Action is OVERRULED.

The demurrer to the Fifth Cause of Action is SUSTAINED with leave to amend as to the breach of contract claims and OVERRULED as to the intentional interference with contractual relationship claim.

The demurrer to the Fourth, Sixth, Seventh and Eighth Causes of Action is OVERRULED.

The demurrer to the Ninth Cause of Action is SUSTAINED with leave to amend.

Defendants DIRECTV's and Hughes' Motion to Compel Arbitration is GRANTED. An order compelling arbitration of the underlying dispute on the merits shall issue after determination of the class action issues in this court.

Request for Judicial Notice

As a preliminary matter, this Court takes judicial notice as requested by Defendants of Plaintiff's Demand for Arbi-

tration, dated April 20, 2001, Plaintiff's Amended Demand for Arbitration, dated June 22, 2001, and the Sales Agency and USSB Agreements. The court declines to take judicial notice of Exhibit C, Letter from Frank Goodrich, plaintiffs' counsel, to the American Arbitration Association, dated June 22, 2001, because the letter does not meet the criteria specified in Evidence Code section 452.

Demurrer

Defendants DIRECTV, Inc. and Hughes Electronic Corporation (collectively "defendants") demur to the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth causes of action of Plaintiffs' First Amended Complaint (FAQ). Defendants demur to all causes of action on grounds that there is another action pending between the same parties on the same causes of action. (Code Civ. Proc., § 430.10(c).) That action is an arbitration entitled *Robert Garcia, d/b/a Direct Satellite TV, et al. v. DIRECTV, Inc.*, No. 72-181-00521-01, now pending before the American Arbitration Association, and in which the demand for arbitration and the Amended Demand for Arbitration were served on April 20, 2001 and June 22, 2001 respectively. Defendants demur to the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth causes of action on the ground that these causes of action fail to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10(e).) Defendants also demur to the Fifth cause of action on the ground that it is barred by the statute of limitations.

Appendix B

A demurrer simply tests, as a matter of law, if the pleading states facts sufficient to constitute a cause of action. (*La Jolla Village Homeowner's Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1141.) In addition, the court in *Trewin v. California* (1984) 150 Cal.App.3d 975, 980, stated that a court may not consider evidence outside of the pleadings, not make interpretations of the matter before it when such interpretations involve resolving factual questions, which cannot be answered by looking at the pleadings. Thus, for the purpose of testing the sufficiency of a cause of action, the demurrer admits the truth of all material facts properly pleaded; this does not include contentions, deductions, or conclusions. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

Further, the question of plaintiff's ability to prove pleaded facts is irrelevant to ruling on a demurrer. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d. 197, 213-14.) A demurrer may be used only to challenge defects that appear on the face of the complaint. Neither extrinsic evidence, nor contentions, deductions, or conclusions can be considered. (*Dyer v. Northbrook Property & Casualty Ins. Co.* (1989) 210 Cal.App.3d 1540, 1542-43.)

Defendants demur to all causes of action on grounds that there is another action pending between the same parties on the same causes of action. (Code Civ. Proc., § 430.10(c).) Code of Civil Procedure section 430.10(c) provides that a demurrer should be sustained where there is "another action pending between the parties on the same cause of action." The other action is an arbitration entitled *Robert Garcia, d/b/a Direct Satellite TV, et al. v. DIRECTV, Inc.*, No. 72-181-00521-01,

now pending before the American Arbitration Association, and in which the demand for arbitration and the Amended Demand for Arbitration were served on April 20, 2001 and June 22, 2001 respectively. (Demurrer RJN, Exhs. A & B.) As there is another action pending, it is proper to sustain Defendants' demurrer if the arbitration involves the "same parties" and the "same cause of action."

The parties are the same if they "stand in the same relative position as plaintiff and defendant" in both actions. (*National Auto. Ins. Co. v. Winter* (1943) 58 Cal.App.2d 47, 56.) Here, only plaintiffs Robert Garcia and Clear Choices II, Ltd. are named plaintiffs in both actions. DIRECTV/ Hughes stands in the position of defendant in both actions. Therefore, these parties are the same for purposes of section 430.10(c). The purported class members are not yet parties to either action; as nonparties, dismissal on the grounds of another action pending is not appropriate.

The plea of prior action applies if the prior action proceeds on the "same cause of action." This is true even if the two actions do not share identical causes of action, as long as the causes of action and the issues in the two suits are "substantially the same." (*National Auto. Ins. Co. v. Winter*, *supra*, 58 Cal.App.2d at p. 56.) A demurrer should be sustained even if the subsequent action "seeks different relief, or proceeds upon a different legal theory, or may call for different evidence." (5 Witkin, Cal. Procedure (4th ed. 1997) Pleadings, § 1068.) Specifically, demurrer to a second action should be sustained if both actions are founded upon one entire contract, (*Lindsay v. Stewart* (1887) 72 Cal. 540,

542), or seek redress relating to controversies arising out of the same contract (*Wulffjen v. Dolton* (1944) 24 Cal.2d 891, 895-896). Plaintiffs seek to vindicate the same primary right through both the arbitration and their Amended Complaint—DIRECTV's alleged breach of its agreements with plaintiffs by its alleged failure to pay commissions and residual income and alleged wrongful assessment of chargebacks. Plaintiffs' arbitration demand and amended complaint share five identical causes of action. Both allege breach of the 1998 sales agency agreement.

Plaintiffs allege DIRECTV engaged in a deliberate effort to breach its obligations under the dealer agreements. Variations in pleading of specific acts committed in furtherance of this common purpose consti-tutes a "single cause of action arising out of a continuous course of conduct." (*Tooke v. Allen* (1948) 85 Cal.App.2d 230, 236.) Because plaintiffs seek to vindicate the same primary right through both the arbitration and their amended complaint, both involve substantially the same cause of action.

The pending AAA arbitration is "another action" within the meaning of Code of Civil Procedure section 430.10(c). (*Colvig v. RKO Gen., Inc.* (1965) 232 Cal.App.2d 56, 71-72.) Plaintiffs filed their demand for arbitration on April 20, 2001, and amended their demand for arbitration on June 22, 2001. Plaintiffs filed the original complaint in this action on October 4, 2001.

In their Response, Plaintiffs do not provide argument to dispute the demurrer on grounds of another action pending. Rather, they request this Court to order classwide arbitration

as provided for in *Keating v. Superior Court* (1982) 31 Cal.3d 584. However, "[a]n order of abatement issues as a matter of right not as a matter of discretion where the conditions for its issuance exist." (*Lawyers Title Ins. Corp. v. Superior Court* (1984) 151 Cal.App.3d 455, 460.) "A trial court has no discretion to allow the second action to proceed if it finds the first involves substantially the same controversy between the same parties." (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574.) Because the prior arbitration action involves substantially the same controversy between the same parties, defendants have the right to an order of abatement. The demurrer to all causes of action is sustained on the ground of another action pending as to plaintiffs Robert Garcia and Clear Choices II, Ltd. only. The court is not prohibiting Mr. Garcia and Clear Choices II, Ltd. from joining any future class that may be certified.

Defendants demur to Plaintiffs' Third Cause of Action for violation of Business and Professions Code sections 17200 et seq. on the grounds that this cause of action fails to state facts sufficient to state a cause of action. In order to maintain a cause of action under the Unfair Competition Law ("UCL"), plaintiffs must allege conduct that is either fraudulent, unlawful or unfair. (Bus. & Prof. Code § 17200; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180; *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 623, 647.)

The FAC alleges that Defendants have withheld information from plaintiffs, misreported information to plaintiffs, assigned multiple customers duplicate subscriber numbers, mis-classified receivers, failed to report new customers,

erroneously designated customers and inaccurately reported active customers as inactive. (FAC, ¶¶ 13-19, 37-43.) Plaintiffs allege that by these activities defendants have misled plaintiffs as to the amounts they were entitled to receive as compensation and unlawfully deprived plaintiffs of commissions and revenues due to them under the agreements. (*Ibid.*)

"The standard for determining whether an action is 'fraudulent' within the meaning of section 17200 is simply 'whether the public is likely to be deceived.' [Citation.] 'This means a section 17200 violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.'" (*Aicco, Inc. v. Insurance Co. of N. America* (2001) 90 Cal. App.4th 579, 588.)

"A business practice is 'unfair,' 'when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" (*Community Assisting Recovery, Inc. v. Aegis Security Ins.* (2001) 92 Cal.App.4th 886, 894.)

The conduct described in the complaint meets these standards. While plaintiffs' argument on the UCL's "unlawful" prong are less persuasive, the complaint alleges violations of Business and Professions Code sections 17200 et seq. sufficient to survive demurrer. The demurrer is overruled as to the Third Cause of Action.

Appendix B

Defendants demur to Plaintiffs' Fifth Cause of Action for intentional interference with contractual relationship on the grounds that the cause of action fails to state facts sufficient to constitute a cause of action, that a forum selection clause ("FSC") in the USSB agreements (Demurrer RJN, Exh. D, p. 101) mandates that disputes arising out of those agreements must be litigated exclusively in Minnesota state or federal courts, and that the cause of action is barred by the statute of limitations. Defendants' memorandum of points and authorities does not address the first ground of failure to state facts sufficient to constitute a cause of action.

"California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable" as long as "California consumers will not find their substantial legal rights significantly impaired by their enforcement." (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11-12.) Plaintiffs contend that the forum selection clause is not enforceable because state and federal courts in Minnesota do not recognize classwide arbitration, impairing the rights of California residents. In *America Online*, the court held the forum selection clause was unenforceable for two reasons. First, plaintiffs sought class action relief under the Consumer Legal Remedies Act ("CLRA"), which contains an anti-waiver provision. Enforcement of the FSC would have been the equivalent of a contractual waiver of the consumer protections under the CLRA and prohibited under California law. (*Id.* at p. 5.) Second, the law of the selected forum did not allow consumer lawsuits to be brought as class actions, violating an important policy under the California's consumer protection law. (*Ibid.*) Here, plaintiffs bring a business dispute

that does not implicate the CLRA. Plaintiffs have not shown that California's interest in its classwide arbitration law rises to the importance of that given the policy underlying the consumer protection laws. Further, the Unfair Competition Law does not contain an anti-waiver provision similar to the provisions of the CLRA at issue in *America Online*. These factors weigh in favor of enforcing the forum selection clause. The demurrer to the fifth cause of action for breach of the USSB agreements is sustained with leave to amend.

As to the fifth cause of action for intentional interference with contractual relationship, Defendants' demurrer addresses only the statute of limitations ground. "[A] demurrer on the ground of the bar of the statute of limitations does not lie where the complaint merely shows that the action may have been barred. It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred." (*Moya v. Northrup* (1970) 10 Cal.App.3d 276, 283.) The complaint states that plaintiffs received a letter from defendants stating that the USSB residual "will be discontinued on June 29, 1999." (FAC, ¶ 20.) The letter does not demonstrate affirmatively that the cause of action accrued on that date and is necessarily barred, but rather that the cause of action might be barred. That is not enough to sustain the demurrer. The demurrer is overruled as to this ground.

Defendants demur to the Ninth Cause of Action for "Request for Equitable Injunction" on the ground that an injunction is a remedy rather than a cause of action. Defendants are correct. "Injunctive relief is a remedy, and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted. (*Shell Oil Co., Inc.*

v. Richter (10942) 52 Cal.App.2d 164, 168.) In their Response to the demurrer, Plaintiffs offer to amend the complaint to state a claim for injunctive relief as a remedy available under plaintiffs' UCL claims. As Plaintiffs have shown that this claim may be amended to correct this deficiency, the demurrer to the Ninth Cause of action is sustained with leave to amend.

Although Defendants' motion also demurs to the fourth, sixth, seventh and eighth causes of action on the ground that these causes of action fail to state facts sufficient to constitute a cause of action, Defendants' memorandum of points and authorities does not mention these causes of action and provides no argument. "The absence of the memorandum [of points and authorities] may be construed by the court as an admission that the motion or special demurrer is not meritorious and cause for its denial and, in the case of a demurrer, as a waiver of all grounds not supported." (Cal. Rules of Court, rule 313(a).) As the grounds for the demurrer as to these causes of action is not supported by the memorandum of points and authorities, the demurrer is overruled as to these causes of action.

In overruling the demurrer and allowing the case to go forward, this court does not intend to suggest that the court has any opinion about the ultimate outcome of this matter following appropriate dispositive motions or trial.

Motion to Compel Arbitration

"As a general proposition, class actions are favored in California." (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 578; *City of San Jose v.*

Superior Court (1974) 12 Cal.3d 447, 457; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807-808.) In light of this policy in favor of allowing plaintiffs an opportunity to a determination of whether class certification is proper, this court has an interest in protecting the rights to this opportunity of the California residents among the purported class of over 6,000 members.

This court has the authority to order classwide arbitration in an appropriate case (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 613.) Defendants contend that classwide arbitration is prohibited by the terms of the Sales Agency Agreement that the parties have entered. The section of the Sales Agency Agreement entitled ARBITRATION provides that: "This Section and any arbitration conducted hereunder shall be governed by the United States Arbitration Act (9 U.S.C. Section 1, et seq.) [the "FAA"]." (Reply RJN, Exh. C, ¶ 18.12(c).) Defendants argue that in furtherance of the FAA's purpose of giving effect to the parties' intent, numerous federal courts have concluded that there is no authority to order class arbitration where the arbitration agreement does not expressly provide for class treatment. (See *Gammaro v. Thorp Consumer Disc. Co.* (D. Minn. 1993) 828 F.Supp. 673; *Iowa Grain Co. v. Brown* (7th Cir. 1999) 171 F.3d 504; *Randolph v. Green Tree Fin. Corp.* (M.D. Ala. 1997) 991 F.Supp. 1410; *In re Piper Funds, Inc.* (8th Cir. 1995) 71 F.3d 298.) However, in *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 56-61, the Court of Appeal examined these cases and declined to follow this line of reasoning, instead concluding that the FAA does not preclude application of the California classwide arbitration

rule. While the lower federal court cases defendants rely on are merely persuasive authority, *Blue Cross* is binding on this court.

Defendants also contend that the FAA preempts California classwide arbitration law. This court is not persuaded. In *Blue Cross*, the court held that California's rule permitting classwide arbitration is not preempted by section 4 of the FAA. (*Id.* at pp. 50-52 ["state law is preempted to the extent it stands as an obstacle to contractual arbitration;" "In short, the act preempts state antiarbitration law so as to prevent state and federal courts from reaching different results about the validity and enforceability of arbitration agreements in similar cases"].)

Oral argument at the April 9, 2002 hearing of this motion made it clear that the AAA arbitrator would not be able to certify a class under the FAA rules. If a determination of the propriety of the class action vehicle requested by plaintiffs is to be made, it must be made in this court. The situation here "brings the instant case within the relatively unusual circumstances contemplated in *Keating v. Superior Court* (1982) 31 Cal.3d 584 [183 Cal.Rptr. 360, 645 P.2d 1192], in which a court must first determine the class action issues but then the merits of the underlying dispute may be subject to an order compelling arbitration, including arbitration on a class-wide basis if appropriate." (*Gainey v. Occidental Land Research* (1986) 186 Cal.App.3d 1051, 1053-1054.) As such, this is an appropriate case for the court to first determine whether class certification is proper, and then order the case to arbitration. Defendant's motion to compel arbitration is granted, but only after determination of the class action

certification issues in this court. Enforcement of the order compelling arbitration is stayed pending the court's ruling on a class certification motion.

The court recognizes the need to expedite this matter to arbitration. At a status conference set for May 7, 2002 at 2:30 p.m., the parties are to set a briefing schedule for a class certification motion.

This court has no opinion on whether class certification is appropriate in this action. The court is only interested in providing a mechanism making the class action vehicle available in order to protect the interests of California residents.

In sum:

Defendants DIRECTV's and Hughes' Demurrer to the First Amended Complaint is SUSTAINED without leave to amend on the grounds that there is another action pending as to plaintiffs Robert Garcia and Clear Choices II, Ltd. only. (Code Civ. Proc., § 430.10(c).) As to these two plaintiffs, the action is abated pending disposition of the arbitration *Robert Garcia, d/b/a Direct Satellite TV, et al. v. DIRECTV, Inc.*, No. 72-181-00521-01, now before the American Arbitration Association.

The demurrer to the Third Cause of Action is OVERRULED.

Appendix B

The demurrer to the Fifth Cause of Action is SUSTAINED with leave to amend as to the breach of contract claims and OVERRULED as to the intentional interference with contractual relationship claim.

The demurrer to the Fourth, Sixth, Seventh and Eighth Causes of Action is OVERRULED.

The demurrer to the Ninth Cause of Action is SUSTAINED with leave to amend.

Defendants DIRECTV's and Hughes' Motion to Compel Arbitration is GRANTED. An order compelling arbitration of the underlying dispute on the merits shall issue after determination of the class action issues in this court.

IT IS SO ORDERED.

Dated: 4/17/02

s/ Victoria Gerrard Chaney
Victoria Gerrard Chaney
Judge

APPENDIX C — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED FEBRUARY 25, 2003

Court of Appeal, Second Appellate District,
Division One - No. B158570
S112902

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ROBERT GARCIA et al.,

Plaintiffs and Respondents,

v.

DIRECTV, INC., et al.,

Defendants and Appellants.

Petition for review DENIED.

s/ GEORGE
Chief Justice